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ZAMZURI BIN NAZARI

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, IPOH

TUAN CHIN FOOK YEN JC

b

[CRIMINAL APPEAL NO. PCA 52-40-94]

26 JULY 1995

EVIDENCE: Admission - Written statements by accused - Whether amounted to a confession - Test - Whether that of an objective reasonable man test - Extrinsic facts - Whether relevant - Evidence Act 1950 s. 31.

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CRIMINAL LAW & PROCEDURE: Rape - Section 375 Penal Code - Conviction - Whether sufficient evidence adduced - Failure to consider vital evidence - Whether a misdirection - Whether fatal - Sentence - Whether appropriate.

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The appellant was convicted of two counts of rape under s. 375 Penal Code. The Sessions Judge, in calling for the appellant's defence, *inter alia* relied on two statements (P7 & P8) Which the appellant had written after his arrest. According to the learned Judge, the statements, being self incriminating, amounted to a confession, and therefore became receivable in evidence. Before the learned appeal Judge the primary issues that arose were (1) whether P7 and P8 herein did in fact amount to a confession (2) if not, whether there was sufficient evidence to support the findings of the Sessions Judge below.

Held:

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[1] The test whether a statement is a confession is an objective one, whether to the mind of a reasonable man reading the statement at the time and in the circumstances in which it was made can be said to amount to a statement that the accused committed the offence or which suggested the inference that he committed the offence. The statement, in addition, must be looked at as a whole and considered only on its own terms without reference to extrinsic facts.

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[2] In the present case, without extrinsic facts there was nothing in P7 and P8 that could implicate the appellant. The appellant's feeling of remorse expressed therein could well be due to the imminent adverse publicity of the impending trial of the case. There was nowhere in the letters from which an inference could be made that he admitted having committed the offence.

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[3] The learned trial Judge was clearly influenced by extrinsic facts when he concluded that P7 and P8 could not have referred to other cases since there were no other cases except the present two charges pending against the accused. Both P7 and P8 should not have been admitted into evidence.

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[4] In respect of the first charge, certain vital evidence had been overlooked by the learned Sessions Judge. The credibility of the complainant's allegation that there was a struggle between her and the appellant in the small room of that small flat when SP 10 was present in the flat, ought to be given due assessment by the Sessions Judge. This is particularly so when in his evidence, not a word was mentioned by SP10 of the alleged struggle. This failure amounted to a non-direction. In any event, on the principle of maximum evaluation test, the prosecution had failed to prove the case beyond reasonable

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doubt, and his defence therefore should not have been called.

[5] In respect of the second charge, the Sessions Judge was right in calling for the defence, as the prosecution has proved a beyond any reasonable doubt case which if un rebutted would warrant a conviction. The defence was only a bare denial and that being the case the conviction that followed must be held to be proper. As for the sentence, 7 years imprisonment, without the rattan, is adequate and fair.

Cases referred to:

Lemanit v. PP [1965] 2 MLJ 28 (*refd*)

Anandagoda v. The Queen [1962] 1 WLR 823 (*refd*)

Mat v. PP [1963] MLJ 263 (*refd*)

Din v. PP [1964] MLJ 300 (*refd*)

Chiu Nang Hong v. PP [1965] 1 MLJ 40 (*refd*)

Khoo Hi Chiang v. PP [1994] 2 CLJ 151 (*refd*)

Legislation referred to:

Evidence Act 1950, s. 31A(1)

For the appellant - M/s. Naran Singh & Co.

For the public prosecutor - DPP

JUDGMENT

Chin Fook Yen JC:

The appellant was tried before the Sessions Court on the following two charges:

Pertuduhan pertama:

Bahawa kamu pada 25 Jun 1994, jam lebih kurang 3.00 p.m. di Blok 13-00-01, Kem 25 RAMD, Jalan Pahang, Tapah, dalam Daerah Batang Padang, di Negeri Perak, telah merogol seorang budak perempuan bernama Irdiana bt. Mahyudin, KP. 790524-08-5914, umur 15 tahun 1 bulan, dan dengan demikian kamu telah melakukan satu kesalahan di bawah s. 375 Kanun Kesiksaan dan boleh dihukum di bawah s. 376 Kanun yang sama.

Pertuduhan kedua:

Bahawa kamu pada 26 Jun 1994, jam lebih kurang 10.00 p.m. di Blok 13-00-01, Kem 25 RAMD, Jalan Pahang, Tapah, dalam Daerah Batang Padang, di Negeri Perak, telah merogol seorang budak perempuan bernama Irdiana bt. Mahyudin, KP. 790524-08-5914, umur 15 tahun 1 bulan, dan dengan demikian kamu telah melakukan satu kesalahan di bawah s. 375 Kanun Kesiksaan dan boleh dihukum di bawah s. 376 Kanun yang sama.

At the conclusion of the full trial, the Court found the appellant guilty on both charges and sentenced the appellant to 6 years imprisonment and 5 strokes of rattan in respect of the 1st charge and 7 years imprisonment and 5 strokes of rattan in respect of the 2nd charge with both the imprisonment sentences to run consecutively. He now appeals against convictions and sentences.

The facts of the case are these. The appellant is the step-father of the complainant whose mother he has married since she was about 4 years old. At all material times, the complainant, her mother (SP8) and her younger brother (SP10), all stayed together with the appellant, a member of the Army at Kem 25 RAMD, Tapah. It was one of those Rumah Kelamin Angkatan Tentera (a self-contained double-room flat with a sitting-room, kitchen and bath-room).

On 25 June 1994 at 3.00 p.m, the complainant, sleeping in the sitting-room, was awakened by the appellant who told her to have a bath. She got up and went to her room instead to continue with her sleep. The appellant pulled her into the other room, "bilik itu bilik

a emak saya.” While in the mother’s room, the appellant raped her. At that material time her mother (SP8) was away in Ipoh but her younger brother (SP10) was in the flat.

b On 26 June 1994 at 10.00 p.m. the complainant was resting in the sitting-room, tired after a day’s work, when the appellant came out from his room (meaning her mother’s room) spread a pillow on the floor in the sitting-room; switched off the light and pulled her hand. She struggled free. After the appellant had switched on the “video lucas”, he pulled her hand by force and spread her on the pillow, and he raped her. On that second occasion nobody else was present in the flat except the complainant and the appellant.

On both the occasions, the ejaculations of the sperm were done on outside her body, according to her.

c On her return from Kedah where her Kampung was on 28 June 1994, SP8 waited in the flat until 9.00 p.m. when the complainant came back home. The complainant explained to her angry mother why she stayed out late. She told SP8 that “yang abah (meaning the appellant) buat dia dari Darjah 6 sampai ke 26 June 1994.”

d On 29 June 1994 the complainant made a polis report which resulted in the arrest of the appellant. While the case was pending trial at the Court below, there were sight-encounters among all the parties, Tapah being such a small town. According to SP8, she “pada 12 Julai 1994 menghantar surat (P7) daripada (the appellant) kepada (the complainant.)” According to SP10, he testified that “selepas (the appellant) menulis surat (P8) beliau menyuruh (him) menghantar surat tersebut kepada (the complainant).” P7 and P8 were admitted in evidence. Needless to say, the Counsel for the appellant strongly objected to their admissibility, denying that they were his letters.

e Before I proceed to examine the rest of the evidence, I will deal with the admissibility of the exhibits P7 and P8.

Counsel for the appellant referred to s. 31A(1) of the Evidence Act 1950, which reads:

s. 31A. Admissibility of statements in criminal proceedings.

f (1) Where in any criminal proceedings, a statement, whether written or verbal, made by any person charged with an offence, is admissible in evidence under or by virtue of any written law, then, notwithstanding anything contained in that written law, such statement shall not be admitted in evidence, or produced in, or considered by, the Court, unless evidence of such statement is given-

(a) by the officer to whom the statement is made; or

g (b) by the person charged with the offence.

and submitted that such statements i.e. P7 and P8 should not be admitted in evidence, or produced in, or considered by, the Court, unless evidence of such statement was given:

(a) by the officer to whom the statement is made; or

h (b) by the person charged with the offence.

Since there was no officer involved here and the appellant even denied P7 and P8 as his statements, Counsel for the appellant submitted that it was wrong in law to have admitted them in evidence. The Sessions Court Judge admitted them as evidence on the ground that “P7 and P8 were conclusively proven by the prosecution that they were written by the (appellant)” and that the appellant was “the sole author of the letters.” On page 74

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of the written judgment the trial Sessions Judge said, "To my mind, the accused was cunning enough not to write his name or signature on P7 and P8 so as to avoid detection. That was also his motive in not mentioning actual names in those documents.

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I will now consider the contents of P7 and P8 after arriving at an unequivocal finding that P7 and P8 came from the accused.

P7 was received by SP11 (the complainant) on 12 July 1994. P8 must be written after 8 July 1994 because on the last page of P8, the accused asked SP11 to look for newspapers dated 8 July 1994. So when the accused wrote P7 and P8, the subject matter that he was referring to in P7 and P8 was the pending rape cases brought against him in Court by SP11. This is so because the accused was first brought to this Court on 7 July 1994 and P7 and P8 could not have referred to other cases since there were no other cases except the present two charges pending against the accused. SP11 also confirmed that "this was the only report that she lodged against the accused." The Sessions Judge concluded that "to a larger extent, P7 amounted to a confession by the accused which was made voluntarily to SP11."

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As regard P8 again the Sessions Judge expressed his view that "there were some portions that incriminate the accused, I quote:

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Kakak mungkin tak fikir itu semua... yang lepas itu tetap, lepas. Bagi abah tak ada harapan (1) kerja pun dah berhenti (2) nak masuk pula penjara... Abah akan terima dan sambut cabaran kakak... kalau 7 tahun abah dipenjarakan 3 tahun kakak di pemulihan... Sebelum apa-apa terjadi itulah abah mahu berpakat dan berbincang dengan cara elok abah tak mahu muka kita atau cerita begini diketahui umum" and "sebelum terlambat lebih baik kita berbincang. Lagi 2 minggu saja, jangan tinggal 2 - 3 hari baru nak berbincang.

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I am compelled to ask the question whether they amounted, in fact to a confession which implicated the appellant. I pause here to quote what the Chief Justice of Singapore said in the case of *Lemanit v. PP* [1965] 2 MLJ 28 - "In *Pika Bewa v. Emperor* [1912] ILR 39 Cal 855 Holmwood and Sharfuddin JJ held that where the only evidence of an offence is a statement by the accused and it is relied on by the prosecution as evidence thereof it must be taken as a whole, and nothing must be read into it which is not contained therein. As they said, 'it is all the evidence we have; and when the accused's own statement is to be relied upon, it must be taken as a whole, and nothing can be read into it which is not found within the four walls of the statement'.

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On the facts of that case it was clear that Pika Bewa administered a drug to her husband which she thought was some charm or love potion to procure the love of her husband. This is all she said in her statement and there was nothing within the four walls of that statement to incriminate her although it turned out on the rest of the evidence that the drug itself was a poison which caused her husband's death.

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In *Anandagoda v. The Queen* [1962] 1 WLR 823 Lord Guest said:

The test whether a statement is a confession is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstance in which it was made it can be said to amount to a statement that the accused committed the offence or which suggested the inference that he committed the offence. The statement must be looked at as a whole and it must be considered on its own terms without reference to extrinsic facts. In this connection their Lordships consider that the view expressed by Gratiaen J in *Seyadu v. King*, "The test of whether an 'admission' amounts to a 'confession' within the meaning of s. 17(2) must be decided by reference only to its own intrinsic terms" is correct. It is not permissible in judging whether the statement is a confession to look at

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- a* other facts which may not be known at the time or which may emerge in evidence at the trial. But equally it is irrelevant to consider whether the accused intended to make a confession. If the facts in the statement added together suggest the inference that the accused is guilty of the offence then it is nonetheless a confession even although the accused at the same time protests his innocence.'

In *Lemanit's* case the statement reads as follows:

- b* I came from Pulau Langsar, Indonesia. I was arrested by the Indonesian police and taken to Blakang Padang. On arrival there (Blakang Padang) the Indonesian police gave to me a bomb and said that if I did not carry it and explode it in Singapore I would be put in jail for six years. I received the bomb. One of their men, named Hasan followed me to Singapore. He accompanied me to the place where the bomb is to be exploded. If I did not explode the bomb, this man Hasan would report back to the Indonesian police and that
- c* I would be shot by them when I returned to Indonesia. I was forced to set fire to the bomb and to throw it at a place where there were no people. For this reason I plead to your Honour to allow me to remain in Singapore because if I go back to Indonesia I will be shot dead.

On the facts of the case, he clearly admitted in his statement exploding a bomb at a place in Singapore, without reference to extrinsic facts.

- d* Applying this test to P7 and P8 which, I hold, were undoubtedly written by the appellant, without extrinsic facts there was nothing that could implicate the appellant. The appellant's feeling of remorse expressed in P7 and P8, could well be due to the imminent adverse publicity of the impending trial of a case of such a nature. There was nowhere in them, that could be inferred that he admitted having committed the offence. The over-all impression created by P8 tends to show the dreadful consequences that would entail in the event of a conviction. On its intrinsic terms I cannot infer any implication against
- e* the appellant. The trial Sessions Judge obviously had been influenced by extrinsic facts, when he referred to the evidence of the complainant and said that "P7 and P8 could not have referred to other cases since there were no other cases except the present two charges pending against the accused. SP11 also confirmed that this was the only report that she lodged against the accused".

- f* Accordingly applying this test as aforesaid, I also rule P7 and P8 inadmissible in evidence besides s. 31A of the Evidence Act, 1950. Besides P7 and P8 which are now excluded from consideration, what is left of the evidence has to be considered to determine the charges against the appellant.

- g* Now I proceed to examine the evidence as recorded without taking into consideration P7 and P8.

The medical evidence by SP1 and SP2, the two doctors was substantially as follows:

..hymen (of the complainant) telah pecah - old tear... dan multiple tears... tidak boleh memberitahu jangka masa koyakan selaput dara (hymen)...koyakan lama bermakna lebih 24 jam dan lebih lama daripada itu. Koyakan ini terjadi oleh sesuatu penetration.,

- h* From the aforesaid medical evidence there was undoubtedly evidence of penetration. Consent or otherwise is never the issue as the complainant was under the age of 16 at the material time.

The complainant alleged that she was raped on 25 June 1994 at 3.00 p.m. by the appellant in her mother's room. I have carefully examined the written judgment and the evidence as recorded.

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Complainant testified that she “tidak ikut apa yang disuruh oleh bapa tiri saya, dan cuba melarikan diri darinya tetapi dia menarik saya lagi. Dia, menarik saya ke atas katil dan menanggalkan seluar dalam saya” and how she tried to free herself, but in vain. I mention the struggle not that consent was material, but to indicate the commotion that would and could have caused in a small room in a small flat when SP10 was there at all times. As the complainant under cross-examination said that “Pada 25 Jun 1994 jam lebih kurang 3.00 petang Irby adik saya berada bersama-sama saya.”

When SP10 gave evidence not a word was mentioned about this alleged incident. Again in the evening of 25 June 1994 the complainant had the opportunity but failed to disclose the incident to her mother when the latter returned home from Ipoh. This is what SP8 said in her evidence “Pada 25 Jun 94 jam lebih kurang 8.00 pagi saya pergi ke Ipoh dan balik ke rumah pada 7.00 malam pada hari yang sama. Semasa saya balik dari Ipoh jam lebih kurang 7.00 malam suami saya dan anak perempuan (meaning complainant) berada di rumah.” The trial Sessions Judge, had totally overlooked to consider such vital piece of evidence. It is trite law that non-direction of an important and material piece of evidence may be tantamount to misdirection.

Had the trial Sessions Judge considered the material evidence it is clearly possible he might have come to a different conclusion. I therefore hold that in respect of the first charge, at the close of its case, the prosecution had failed to prove the case beyond reasonable doubt on the principle of maximum evaluation test as laid down in the case of *Khoo Hi Chiang v. PP*. The appellant should not have been called to enter upon his defence. Even if I were wrong, on the question of non-direction there was evidence in his defence, the appellant’s explanation that he was at all material times sleeping with SP10, would have, on the principle laid down in the case *Mat v. PP* [1963] MLJ 263 entitled him to an acquittal, as it raised a reasonable doubt as to his guilt. I therefore acquit and discharge the appellant on the first charge.

I now turn to consider the 2nd charge.

The complainant told her mother of the incident of the 26 June 1994 when the latter returned home on 28 June 1994. I agree with the trial Sessions Judge that under such circumstances a delay of 2 days was not inordinate and was excusable, as that was the first reasonable opportunity for the disclosure. Thus there was the medical evidence of penetration and to some extent corroborative evidence of identity. To use the words of Thomson LP in *Din v. PP* [1964] MLJ 300 “it is a case of which story is to be preferred and it seems to follow from this that corroboration of any part of the prosecutrix’s story is ‘*pro tanto*’ of some value.” The trial Sessions Judge was very impressed by the credibility of the complainant as a witness. He wholly accepted her evidence. I am satisfied that the prosecution had proved its case beyond any reasonable doubt which if unrebutted would warrant a conviction.

Alas, the defence was one of *bare denial*. The appellant offered an explanation that at the material time, he had a quarrel with one Encik Zakaria in the flat and Encik Zakaria left the flat at 10.00 p.m. - the crucial time. The trial Sessions Judge disbelieved the episode and had this to say. “The accused’s evidence with regards to his quarrel with Encik Zakaria was never put to SP11 (the complainant) during the prosecution’s case and as such I would not give it much weight,” This point was not in fact taken or even canvassed in the Court below for reason best known to the appellant.

a I note that the Sessions Judge reminded himself of the decision in *Chiu Nang Hong v. PP* [1965] 1 MLJ 40. I have read his judgment and am convinced that he was perfectly well aware of the risk in convicting the appellant on uncorroborated evidence, even if in fact there was no corroboration, and he had acted on it.

b As the appellant has not been able to satisfy me that there are grounds for interfering with his conviction by the Court below on the 2nd charge, I therefore dismiss his appeal against the conviction.

As regards sentence, I affirm the sentence of imprisonment of 7 years. However, I set aside the sentence of 5 strokes of rattan, as I observed there was no evidence of acts of violence or threats involved. The appellant had been providing them with food and shelter for the past 10 years or so. I feel 7 years imprisonment is adequate and fair without the rattan.

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